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Ex Parte

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96, and 00-2

Dear Chairman Powell and Commissioners:

On behalf of Discovery Communications, Inc., we have previously argued that a multicast must-carry requirement would be unconstitutional since it would burden free speech, but would not further the interests the Supreme Court relied on in *Turner Broadcasting* when it upheld analog must-carry.[1] We also pointed out that a court would be likely to strike down a multicast must-carry requirement without even reaching the constitutional issue – because it would expand must-carry beyond the "primary video" stream Congress identified as subject to mandatory carriage.[2]

In recent meetings with the Office of General Counsel and the Media Bureau, we were asked whether a multicast must-carry rule might be justified on the ground that it advanced a governmental interest *other* than those identified by the Supreme Court – an interest in the digital transition. We also were asked about the relationship between our First Amendment analysis and the Commission's prior interpretation of "primary video."

As discussed below, a multicast must-carry rule cannot be justified on the ground that it would advance the digital transition, and the rule requiring the avoidance of serious constitutional questions compels the Commission to adhere to its prior interpretation of "primary video."

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1 Letter from S. Harris to M. Dortch, C.S. Docket No. 98-120, at 2-3 ("*Discovery Letter*") (Nov. 18, 2003), discussing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

2 *Discovery Letter* at 3-4, addressing the meaning of "primary video" in sections 614(b)(3) and 615(g)(1) of the Communications Act, 47 U.S.C. §§ 534(b)(3), 535(g)(1).

I. Multicast must-carry cannot be justified as advancing the digital transition.

Justice Breyer cast the decisive fifth vote to uphold analog must-carry in *Turner Broadcasting*, and his separate opinion therefore warrants careful analysis.[3] In that opinion, Justice Breyer acknowledged that analog must-carry "amounts to a 'suppression of speech'" because it "interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs."[4] Justice Breyer voted to uphold analog must-carry only because he concluded that it significantly advanced other First Amendment interests – preventing "too precipitous a decline" in the amount of broadcasting available and facilitating the "'widest possible dissemination of information from diverse and antagonistic sources.'"[5] Justice Breyer disclaimed reliance on the "fair competition" rationale advanced by broadcasters in *Turner Broadcasting*.[6] Thus, analog must-carry survived judicial scrutiny only because there were "important First Amendment interests on both sides of the equation."[7]

Although the digital transition is an interest of significance to the Commission, it simply does not have the same gravity as the free speech interests relied upon by the Court and Justice Breyer in upholding analog must-carry. Making digital programming available to 85% of households in a market will permit the Commission to auction the analog spectrum, thus obtaining funds for the Treasury and enabling the analog spectrum to be put to other uses. Those are worthy interests, but they are not *First Amendment* interests – indeed they are not interests of constitutional magnitude at all – and "compulsory carriage . . . extracts a serious First Amendment price."[8] Simply put, the governmental interest in more quickly auctioning and using the analog spectrum cannot justify limiting First Amendment rights – particularly when there are numerous other ways to speed the transition.

In reviewing a rule that imposes a significant First Amendment burden, a court will carefully scrutinize not only the strength of the interest purportedly furthered by the rule but also the fit between the rule and the advancement of those interests.[9] Here, the fit between a multicast must-

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3 *Discovery Letter* at 3. Professor Tribe agrees. L. Tribe, "Why the Federal Communications Commission Should Not Adopt A Broad View Of The 'Primary Video' Carriage Obligation: A Reply To The Broadcast Organizations," at 11-12, attached to Letter from D. Brenner, NCTA, to M. Dortch, CS Docket No. 98-120 (Nov. 24, 2003).

4 *Turner Broadcasting*, 520 U.S. at 226 (Breyer, J., concurring in part).

5 *Id.* at 226, 227 (citation omitted).

6 *Id.* at 226.

7 *Id.* at 226, 227.

8 *Id.* at 226.

9 The broadcasters contend that the argument that must-carry "imposes significant first amendment burdens . . . is an argument not against primary video, but against must carry itself." D. Verrilli and I. Gershengorn, "A Constitutional Analysis of the 'Primary Video' Obligation: A Response to Professor Tribe," attached to Letter from J. Goodman to M. Dortch, CS Docket No. 98-120, at 15 (Aug. 5, 2002). But the decision upholding analog must-carry despite its First Amendment burden does not mean that the Court will uphold any must-carry rule. Justice Breyer's analysis shows that analog must-carry survived only because it advanced significant free speech interests.

carry rule and advancing the digital transition is tenuous at best – and surely not clear enough to allow a multicast mandate to survive judicial scrutiny.

First, there is no reason to think that requiring cable operators to carry digital programming provided by broadcasters when they would prefer to carry other digital programming will speed the digital transition. It is at least as likely that a multicast must-carry mandate will *delay* the digital transition by preventing viewers from watching what Justice Breyer termed "their preferred set of programs."[10] That is because a multicast must-carry rule would have a practical effect primarily where a cable operator is required to carry broadcast channels even though the operator believes its audience would prefer other programming. It seems unlikely the public will buy digital televisions *more* quickly if cable operators are forced to carry programs their customers do not want to watch.

Second, because a multicast must-carry rule would guarantee broad availability of standard definition programming, it would have the practical effect of making multicasting more attractive to broadcasters and high-definition programming less attractive. But it is high-definition programming – rather than more of the same thing – that is most likely to spur consumers to buy digital equipment.

The bottom line is that it would be very difficult for any court to conclude that a multicast must-carry requirement advances the digital transition at all – let alone that such a rule is narrowly-tailored to further that interest. In the end, a multicast must-carry requirement would be found unconstitutional because it would expand rather than limit the constitutional burden must-carry imposes, even though the Court previously emphasized that "Congress took steps to contain the breadth and burden of the regulatory scheme."[11]

II. Particularly in light of the principle of avoidance of significant constitutional issues, the Commission should adhere to its definition of "primary video."

The Commission has already "conclude[d] that 'primary video' means a single programming stream and other program-related content."[12] That interpretation was absolutely correct and, standing alone, it precludes the imposition of a multicasting requirement. In light of the severe constitutional problems a multicasting requirement would create, and the weak justifications

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[10] *Turner Broadcasting* at 226 (Breyer, J., concurring in part). In *Mainstream Marketing Services, Inc. v. FTC*, No. 03-1429 (10th Cir., Feb. 17, 2004), slip op. 9, the Tenth Circuit upheld the national do-not-call registry, which "restricts only core commercial speech – i.e., commercial sales calls" and "targets speech that invades the privacy of the home, a personal sanctuary that enjoys a unique status in our constitutional jurisprudence." The infringement on speech caused by a multicast must-carry requirement, in contrast, is not limited to speech that proposes a commercial transaction and the digital transition is not comparable to the interest in personal privacy in the home. In addition, the Tenth Circuit carefully analyzed the alternatives proposed by the telemarketers, such as company-by-company do-not-call lists, and concluded that they simply would not protect personal privacy as well as a national registry. *Id.* 34-37. As discussed above, a careful analysis of the effect of a multicast must-carry rule shows that, contrary to the broadcasters' claims, it is not likely to advance the digital transition.

[11] *Id.* at 216 (opinion of the Court).

[12] *First Report and Order*, In the Matter of Carriage of Digital Television Broadcast Signals (Jan. 23, 2001), ¶ 57.

offered for concluding that "primary video" means multiple streams of video, the Commission should stand by its decision.

In construing the statute, the Commission recognized that "the terms 'primary video' as used in sections 614(b)(3) and 615(g)(1) are susceptible to different interpretations."[13] But because the statute indicates that "there is some video that is primary and some that is not," the Commission concluded that when a broadcaster multicasts "only one of such streams of each television station is considered 'primary.'"[14] The Commission also noted that, although Congress did not mention multicasting in the legislative history of the 1992 Act, "the incorporation of the primary video construct into the Act in 1992 was reasonably contemporaneous with the gradual change in common understanding" that digital television might involve multicasting in addition to or instead of high definition programming.[15]

As an initial matter, even without consideration of constitutional issues, the broadcasters' request for reconsideration of the Commission's interpretation of "primary video" is exceedingly weak. The broadcasters criticize the Commission for "searching for a literal definition" of "primary video" and instead recommend that the Commission rely on "*what was intended by the term.*"[16] But the starting point of statutory interpretation is the language of the statute.[17]

In any event, the broadcasters offer no plausible interpretation of what Congress meant by "primary video" that supports the imposition of a multicasting must-carry requirement. To the contrary, the broadcasters contend that, because multicasting was first mentioned in Commission filings in July 1992, Congress must have been unaware of the potential for multicasting when it drafted the 1992 Act[18] – a curious argument to make in support of a claim that Congress intended to require cable operators to carry multicast channels. Moreover, the broadcasters also argue that Congress did not intend to require carriage of multicast channels offered for a fee, while intending to require carriage of multicast channels provided for free[19] – although how it is that Congress intended to draw that distinction is a mystery under the broadcasters' view that Congress did not foresee the possibility of multicasting.

Based on these self-contradictory arguments, the broadcasters ask the Commission to abandon its straightforward interpretation of "primary video" and instead adopt a definition for which there is no support in the text of the Act, the legislative history, or common sense, and that will squarely present serious – indeed fatal – constitutional problems. Of course, the rules of

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[13] *Id.* ¶ 53.

[14] *Id.*, ¶ 54.

[15] *Id.*, ¶ 56 & n.158.

[16] NAB/MSTV/ALTV Petition for Reconsideration and Clarification, CS Docket No. 98-120, at 12 (emphasis by the broadcasters) (Apr. 25, 2001) ("*Broadcasters' Reconsideration Petition*").

[17] *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute").

[18] *Broadcasters' Reconsideration Petition* at 15 & n.50. It is, of course, absurd to argue that Congress cannot have been aware of a development in the broadcast industry because that development has not yet been placed on the record at the Commission.

[19] *Id.* at 13.

statutory construction support precisely the opposite approach.[20] The Commission should therefore stand by its interpretation of "primary video."

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The Commission should not impose a multicast must-carry requirement. The most direct and effective way to do so would be to explain that such a requirement would present a serious constitutional issue, and to reject the broadcasters' request that the Commission reconsider its interpretation of "primary video" both because the broadcasters have not shown that the Commission erred by giving that phrase its plain meaning and because retaining that reasonable interpretation avoids a serious constitutional issue.

This letter is filed pursuant to section 1.1206(b)(2) of the Commission's rules.

Respectfully submitted,

Scott Blake Harris
Christopher J. Wright

cc: John A. Rogovin
W. Kenneth Ferree

[20] *See, e.g.*, *Zadydas v. Davis*, 533 U.S. 678 (2001) ("'It is a cardinal principle' of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'").